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No. 659

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARTHUR BARY, also known as ACHILLES DIAMANTIS DARAMPARIS, ANNA BARY, HAROLD ZEPELIN, also known as HARRY ZEPELINSKY, LEWIS MARTIN JOHNSON, JOSEPH WILLIAM SCHERRER, MAIA SCHERRER, also known as MAIA TURCHIN, PATRICIA JULIA BLAU, PETITIONERS,

v.

UNITED STATES OF AMERICA, U. S. DISTRICT COURT FOR THE DISTRICT OF COLORADO, and the HONORABLE WILLIAM LEE KNOUS, Chief Judge Thereof, and the Judges and Officers of said Court

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

Cases:	Page
Bain, Ex parte, 121 U.S. 1	6, 10, 11
Bankers Life & Casualty Company v. *Holland*, 346 U.S. 379	4, 5
Bary v. *United States*, 248 F. 2d 201	1, 2, 3, 7, 8
Brandt v. *United States*, 256 F. 2d 79	9
Carroll v. *United States*, 354 U.S. 394	6
Cobbledick v. *United States*, 309 U.S. 323	5
Ex parte Fahey, 332 U.S. 258	4
Ford v. *United States*, 273 U.S. 593	11, 12
Fujimoto v. *United States*, 251 F. 2d 342	9
Huff v. *United States*, 251 F. 2d 342	9
Parr v. *United States*, 351 U.S. 513	5, 6
Perry, Ex parte, 102 U.S. 183	5
Roche v. *Evaporated Milk Association*, 319 U.S. 21	5
Salinger v. *United States*, 272 U.S. 542	12
Sentner v. *United States*, 253 F. 2d 310	9, 10
United States v. *Ballard*, 322 U.S. 78	12
United States v. *Duell*, 172 U.S. 576	5
United States v. *Flynn*, 216 F. 2d 354, certiorari denied, 348 U.S. 909	10-11
United States v. *Jackson*, 257 F. 2d 830	9, 11
United States v. *Kuzma*, 249 F. 2d 619	9
United States v. *Mesarosh*, 223 F. 2d 449	11
United States v. *Russo*, 155 F. Supp. 251	11
United States v. *Silverman*, 248 F. 2d 671	9
Wellman v. *United States*, 253 F. 2d 601	9, 10
Yates v. *United States*, 354 U.S. 298	2, 7, 8-10, 11, 12

Statutes:	
All Writs Act, 28 U.S.C. 1651	4
18 U.S.C. 2385	1-2

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, defendants in *Bary* v. *United States*, 248 F.2d 201 (C.A. 10), were indicted on August 9, 1954 for conspiracy to violate the Smith Act (18

U.S.C. 2385). The indictment (R. 7), which was drawn in one count, charged petitioners with conspiring to violate the Smith Act by—

(1) advocating and teaching the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; and

(2) organizing, and helping to organize, as the Communist Party of the United States, a society, group, and assembly of persons who so teach and advocate.

After a trial lasting approximately two months, the jury, on May 25, 1955, returned verdicts of guilty against each of these petitioners. Thereafter, petitioners appealed their convictions to the Court of Appeals for the Tenth Circuit. Briefs were filed by the parties and the court heard oral argument. While a decision was pending, this Court held in *Yates* v. *United States*, 354 U.S. 298—an appeal from convictions on charges under an indictment similar to that in *Bary*—that the Communist Party was completely "organized," within the meaning of that term as used in the Smith Act, in 1945, and hence that the "organizing" portion of the conspiracy charged in that case was barred by the statute of limitations. Thereafter, supplementary briefs were filed and reargument was heard in the *Bary* case on the sole issue of the sufficiency of the evidence as to each of these petitioners under the criteria of the *Yates* opinion. On August 23, 1957, the court below reversed the convictions and remanded the case for a new trial, holding that in view of *Yates* the trial court had erred in refusing to

withdraw the "organizing" portion of the indictment from the consideration of the jury, but that the evidence was sufficient to warrant retrial of petitioners under the "advocating" and "teaching" portions of the indictment. *Bary* v. *United States*, *supra*.

The case was set for retrial on January 19, 1959.[1] Prior thereto, petitioners moved in the District Court for the District of Colorado before the Honorable William Lee Knous, Chief Judge of the District Court, to dismiss the indictment on the ground that it was constitutionally defective. This motion was denied by Judge Knous on January 8, 1959, without opinion (R. 14). On January 12, 1959, petitioners filed a petition in the Court of Appeals for the Tenth Circuit, for writs of prohibition and or mandamus to stay the trial and direct dismissal of the indictment (R. 2). After hearing argument, the Court of Appeals, on January 15, 1959, denied the petition without opinion, Judge Murrah dissenting on the ground that "the indictment is palpably and fundamentally defective because it does not reflect the action of the Grand Jury" (R. 15). On the same day, the Court of Appeals issued an order permitting petitioners to attempt to proceed in this Court upon a finding that "a substantial question of law" was presented by the petition, and granting a stay of all further proceedings in the *Bary* case "until further order of the Supreme Court of the United States of America, or until Monday, January 26, 1959 at 9:00 a.m., whichever shall earlier occur" (R. 16).

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[1] The case had been set for trial on two previous dates but was continued by the trial court.

Petitioners filed this petition for a writ of certiorari to review the order of the Court of Appeals denying their request for writs of prohibition and mandamus on January 22, 1959 (R. 17). An application for an order staying the trial in the District Court pending action on the petition for certiorari was filed contemporaneously with the filing of the petition. The application for a stay was denied by Mr. Justice Whittaker on January 27, 1959. The retrial commenced the next day, and is expected to continue until early in March.

The petition alleges that the indictment is constitutionally defective in that, with the "organizing" portion barred by the statute of limitations, the indictment no longer reflects the action of the Grand Jury.

1. Even a cursory examination of their petition shows clearly that petitioners are attempting to use the extraordinary writs of mandamus and prohibition as a substitute for their ultimate appeal in the criminal case. The supplementary review power granted by Congress in the All Writs Act, 28 U.S.C. 1651, is meant to be used only in the exceptional case where there is a clear abuse of discretion or usurpation of judicial power, without other remedy.[1] *Bankers Life & Casualty Company v. Holland*, 346 U.S. 379, 382, 383. In a criminal case, it is only the sentence of the court which constitutes the final judgment, and

[1] These writs are "drastic and extraordinary remedies" reserved for "really extraordinary causes" in which an appeal offers an inadequate remedy. *Ex parte Fahey*, 332 U.S. 258, 259-260.

petitioners must await sentencing—if convicted—before they can appeal or seek review. By forbidding piecemeal disposition of criminal cases on appeal, Congress has taken a strong stand against "enfeebling judicial administration * * * by permitting separate reviews of the component elements in a unified cause." *Cobbledick* v. *United States*, 309 U.S. 323, 325. Where statutes establish conditions of appellate review—as in criminal cases—an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid these conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Parr* v. *United States*, 351 U.S. 513, 520-521; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21; *Cobbledick* v. *United States*, *supra*. Thus, even if error of the lower court is clear on its face, this Court will not correct the error by means of an extraordinary writ and the aggrieved party will have to await the correction of the alleged error by appeal from the final judgment. *Bankers Life & Casualty Company* v. *Holland*, 346 U.S. 379; *Ex parte Perry*, 102 U.S. 183. Nor will such a writ ordinarily be granted if there is another legal remedy. *Bankers Life & Casualty Company* v. *Holland*, 346 U.S. at 384-385; *United States* v. *Duell*, 172 U.S. 576, 582. In sum, extraordinary writs cannot be used as a substitute for appeal, even though hardship may result from delay, and perhaps unnecessary trial, and whatever may be done without the writ may not be done with it. *Bankers Life & Casualty Company* v. *Holland*, *supra*, 346 U.S. at 383.

The trial court's denial of petitioners' motion to dismiss the indictment is obviously an interlocutory order, such as is entered every day in criminal proceedings. If the trial court commits prejudicial error with respect to the handling of the barred portion of the indictment, that error can be reviewed and corrected on appeal, if petitioners are convicted. Moreover, this is not a case where there is a question as to the *jurisdiction* of the district court. There is no doubt that that court has full jurisdiction to hear and determine this case. If the court has erred, its error is not a jurisdictional one, but merely an error as to whether the indictment does, or can, state a criminal offense. This is the type of issue regularly decided by district courts in criminal cases, clearly within the district court's criminal jurisdiction, and not at all outside it.[3]

As this Court recently held in *Parr v. United States*, 351 U.S. 513, 520-521:

> This is not a case where a court has exceeded or refused to exercise its jurisdiction, see *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26, nor one where appellate review will be defeated if a writ does not issue, cf. *Maryland* v. *Soper*, 270 U.S. 9, 29-30. Here the most that could be

[3] In *Ex parte Bain*, 121 U.S. 1, on which petitioners rely, the Court did issue an original writ of habeas corpus *after conviction*, but that was at a time (1887) before appeals were allowed in criminal cases (see *Carroll* v. *United States*, 354 U.S. 394, 400), and the only method of reviewing criminal convictions was by extraordinary writ. The decision in *Bain* must be read in the light of that significant historical fact. See also *infra*, pp. 10-12.

claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. *Roche* v. *Evaporated Milk Assn.*, *supra*, at p. 30.

2. This Court's decision in *Yates* v. *United States*, 354 U.S. 298, is dispositive, we think, of petitioners' claim on the merits (Pet. 4-9) that the indictment is constitutionally defective because it includes the "organizing" charge previously held to be barred by the statute of limitations. See *Bary* v. *United States*, 248 F. 2d 201 (C.A. 10). In *Yates*, the Court, after holding that the "organizing" portion of the conspiracy charged in an indictment substantially identical to the one involved in the instant case[4] was barred by limitations (354 U.S. at 303-312), did not consider its holding with respect to the "organizing" charge to be conclusive and to require acquittal of any of the defendants. Instead, the Court expressly held that the "organizing" part of the indictment should have been withdrawn from the jury. See *id.* at 312.

Moreover, the Court gave careful consideration to the nature and essential aspects of the "teaching and advocating" charge, concluding that the trial court's instructions to the jury on this portion of the indictment were erroneous (*id.* at 312-327). Though, as the Court pointed out, these determinations required a reversal of the convictions, it stated

[4] Petitioners make no claim, nor could they fairly do so, that the instant indictment differs in any way material here from that in *Yates*.

that it considered it its duty to go further and examine the record with care "in order to determine whether the way should be left open for a new trial of all or some of these petitioners" (*id.* at 327). After reviewing the evidence against each defendant, the Court ordered acquittals for five but concluded that the evidence adduced against the remaining nine defendants was sufficient to warrant their retrial (*id.* at 327-333). In fact, the Court made frequent references, throughout its opinion, to the propriety of a retrial of some of the defendants and the proper procedure to be employed in the event that such retrial materialized (*id.* at 327, 328, 331, 332, 333, 334). If the finding that the "organizing" phase of the conspiracy was barred by limitations had invalidated the entire indictment and precluded a retrial for the "teaching and advocating" phase of the conspiracy, it is obvious that the Court would not have deemed it necessary to review the evidence to determine whether retrials for the latter offense were warranted or to have ordered such retrials as to nine of these defendants. And there is nothing in the *Yates* opinion to suggest, as petitioners contend (Pet. 5), that this Court ordered such retrials because the alleged invalidity of the entire indictment was not raised by the *Yates* petitioners or because the latter had "consented to the reformation of the indictment" (*ibid.*) by moving to withdraw the organizing charge from the jury.

It is significant, moreover, that a number of appellate courts,[1] relying on this Court's decision in

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[1] Including the court below, see [redacted] v. *United States*, 248 F. 2d 201 (C.A. 10).

Yates, have reversed convictions for violations of the Smith Act under indictments virtually identical to the *Yates* indictment, and ordered retrials of some or all of the defendants, and not acquittals on the ground that the invalid "organizing" portion made the entire indictment defective.[*] None of these courts seems to have considered the barring of the organizing object of the conspiracy to have required a dismissal of an indictment charging a conspiracy to teach and advocate as well as to organize.

Nor does the fact that "[i]t is impossible to determine" which of the overt acts enumerated in the indictment were thought by the *Bary* grand jury to be in furtherance of the "advocacy" phase of the conspiracy, and which it regarded as in furtherance of the "organizing" phase, require the dismissal of the indictment, as suggested by petitioners (Pet. 7-8). Here, too, this Court's opinion in *Yates* would seem to be a complete answer. The Court pointed out (*Yates*, *supra*, at 334) that:

> While upon a new trial the overt act must be found, in view of what we have held, to have been in furtherance of a conspiracy to "advo-

[*] *United States* v. *Kuzma*, 219 F. 2d 619 (C.A. 3); *Brandt* v. *United States*, 256 F. 2d 78 (C.A. 6); *Wellman* v. *United States*, 253 F. 2d 601 (C.A. 6); *Scalpar* v. *United States*, 253 F. 2d 310 (C.A. 8). Other appellate courts ordered the entry of judgments of acquittal, rather than new trials, but their action was based on insufficiency of the evidence, rather than on any alleged deficiency in the indictment arising from the barring of the organizing object of the conspiracy by the statute of limitations. *Huff* v. *United States*, 251 F. 2d 312 (C.A. 9); *Fujimoto* v. *United States*, 251 F. 2d 342 (C.A. 9); *United States* v. *Silverman*, 248 F. 2d 671 (C.A. 2); *United States* v. *Jackson*, 257 F. 2d 830 (C.A. 2).

> cate," rather than to "organize," we are not prepared to say that one of the episodes relied on here could not be found to be in furtherance of such an objective, if, under proper instructions, a jury should find that the Communist Party was a vehicle through which the alleged conspiracy was promoted.

This reasoning, we submit, is equally applicable to the overt acts enumerated in the present indictment since they are, for the most part, substantially similar to those alleged in the *Yates* indictment.

3. Petitioners' reliance (Pet. 5-7) on the doctrine of *Ex parte Bain*, 121 U.S. 1, that an indictment may not be amended by the courts, is misplaced. Similar arguments were raised in *Sentner* v. *United States*, 253 F. 2d 310 (C.A. 8), and *Wellman* v. *United States*, 253 F. 2d 601 (C.A. 6), and were impliedly rejected.[7] Moreover, in *United States* v. *Flynn*, the trial court (prior to *Yates*) held that the "organizing" charge of an indictment substantially similar to the instant one was barred by the statute of limitations and removed it from the jury's consideration. On appeal to the Court of Appeals for the Second Circuit, the judgments of conviction on the "teaching" and "advocating" charges were affirmed, in an

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[7] In *Sentner*, apparently the court did not consider this point worthy of discussion, although it was strenuously presented in the appellants' brief and oral argument. In *Wellman*, Mr. Justice Stewart, then a judge of the Sixth Circuit Court of Appeals, wrote an opinion concurring in the remand of that case for retrial. Neither Mr. Justice Stewart nor the majority opinion discussed the doctrine of *Ex parte Bain* which had been raised by those appellants.

opinion by Mr. Justice Harlan (then a judge of that court); the opinion did not discuss the possible "amendment" of the indictment. *United States* v. *Flynn*, 216 F. 2d 354, certiorari denied, 348 U.S. 909. And the point was discussed and disposed of, contrary to petitioners' contention, in an opinion by Judge Aldrich of the District Court for the District of Massachusetts, denying a pre-trial motion to dismiss the indictment in *United States* v. *Russo*, 155 F. Supp. 251 (D. Mass.), a Smith Act conspiracy case similar to the one involved here, which had not been tried prior to *Yates*. Judge Aldrich relied principally on *Yates*, and the decision of this Court in *Ford* v. *United States*, 273 U.S. 593, discussed *infra*.

In *Bain*, the indictment charged the defendant with intent to deceive the Comptroller of the Currency and his agent, while the statute did not make intent to deceive the Comptroller a crime. The trial court struck the reference to the Comptroller as surplusage and this Court held, after conviction, that the amend-

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Ex parte Bain was brought to the attention of the Second Circuit in *United States* v. *Jackson*, 257 F.2d 830 (retrial of some *Flynn* defendants and fugitives who had not been apprehended at the time of the *Flynn* trial), in which the indictment was ordered dismissed because of insufficiency of the evidence, but the court did not mention it in its opinion. As in *Flynn*, the "organizing" charge had been removed from the jury's consideration by the trial judge.

The refusal of the trial court in the Pittsburgh Smith Act case, *United States* v. *Mesarosh*, 223 F. 2d 149, 159, to dismiss the indictment after striking the organizing charge was expressly approved, without discussion, by the Court of Appeals for the Third Circuit.

ment was fatal. The Court subsequently considered a similar situation in 1927, in *Ford* v. *United States*, 273 U.S. 593, and in a unanimous decision limited the applicability of *Bain*. The *Ford* indictment charged a conspiracy to violate the National Prohibition Act, the Tariff Act of 1922, and the terms of a treaty between the United States and Great Britain. The indictment was attacked on the ground that it charged a conspiracy to violate a treaty, which was not an offense against the United States. Speaking for the Court, Chief Justice Taft held that "that part of the indictment is merely surplusage and may be rejected." With respect to the contention that this would amend the indictment, a contention the same as that made by petitioners, the Court said (at p. 602):

> * * * But it is contended that this is to amend the indictment and comes within the inhibition of the principle of *Ex parte Bain*, 121 U.S. 1. That decision condemns the striking out of words from an indictment. The action here complained of is merely a judicial holding that a useless averment is innocuous and may be ignored.

In *Bain* there was an actual amendment or alteration of the indictment, and the principle of that decision is no broader than that situation. *Salinger* v. *United States*, 272 U.S. 542, 549; see also Stone, C.J., dissenting in *United States* v. *Ballard*, 322 U.S. 78, 90-91 (the majority of the Court did not reach this issue).

In the light of *Yates*, and other decisions of this Court, and of the consistent lower court decisions in

virtually identical (for this purpose) Smith Act cases, it is clear that petitioners' claim that the indictment in this case is constitutionally defective is without merit.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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